Wisconsin Formal Ethics Opinion EF-11-02: Conflicts in Criminal Practice Arising From Concurrent Part-time Employment as an Assistant District Attorney and a Lawyer in a Private Law Firm

Revised March 29, 2021

Synopsis: For purposes of analyzing conflicts under Wisconsin's Rules of Professional Conduct for Attorneys, Wisconsin District Attorneys involved in the prosecution of criminal offenses represent the State of Wisconsin and not the particular county in which they work. As a consequence, an individual lawyer who works part-time as an Assistant District Attorney prosecuting state criminal cases and part-time for a private law firm has a conflict of interest that would bar the lawyer from representing defendants in state criminal cases in any county. The individual lawyer could normally still represent clients in opposition to the State of Wisconsin in non-criminal matters. The lawyer's conflicts would not be imputed to other lawyers in the District Attorney's Office at which the lawyer works provided the lawyer is timely screened from any participation in the matter, in which case that office could continue to prosecute the matter. However, the lawyer's conflicts would be imputed to lawyers in the private law firm and not be subject to informed consent so that the firm would be disqualified from representing defendants in any state criminal cases. Wisconsin Formal Ethics Opinions E-79-8, E-83-19 and E-81-5 and Memo Opinions M-6/70 C and M-2/69 C are withdrawn.

Conflict of interest difficulties may arise for lawyers and their firms when the lawyer is employed as a part-time assistant district attorney and part-time Was a lawyer in a private law firm that has a criminal law practice. Such a situation raises conflict issues for the lawyer, and for both the district attorney's office and the private law firm in which the lawyer works.[1]

1. For Conflict of Interest Purposes Wisconsin Prosecutors Represent the State of Wisconsin

SCR 20:1.7(a) prohibits a lawyer from undertaking representation adverse to a current client. Thus, determination of what limits apply to a part-time district attorney[2] requires identification of her client.

[1]In Wisconsin, a District Attorney's Office is included in the definition of "firm" for purposes of the disciplinary rules. SCR 20:1.0(d).

[2] The Committee believes the client of a district attorney is the same whether she is full or part-time, the elected district attorney, or a deputy or assistant district attorney.

Identifying the client of a government lawyer can be a complex task. Options include the government as a whole,[3] a specific branch of government,[4] a government agency,[5] an individual government official or employee,[6] or the public generally.[7] Correctly identifying the client requires resort to external law as the issue is not addressed in disciplinary rules.[8]

Identification of a district attorney's client may be less complex given that their primary responsibility is the prosecution of criminal cases rather than the representation of individual government officials or employees or government agencies.[9] Ambiguity about the district attorney's client may arise because district attorneys in Wisconsin are elected or assigned to a particular county.

Wis. Stat. § 978.01(1) divides the state into seventy-one prosecutorial units, one for each county, with a single exception[10]. The district attorney's authority is limited to prosecution of criminal cases in that geographic unit. Wis. Stat. § 978.05(1). Wis. Const. Art. VI sec. 4 also recognizes the district attorney as a county-level constitutional officer.

This is consistent with the historical development of the district attorney as a local, elected official[11] as well as contemporary practice. Approximately 85% of district attorney offices in the

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[3] Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61,66 (Fall 1978).

[4] Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1298 (1987).

[5] *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910, 915-921 (8th Cir. 1997); *see* SCR 20:1.13.

[6] *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. Off. Legal Counsel 47, 54 (1982).

[7] Lawry, n. 3, *supra*; Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?* 83 Minn. L. Rev. 473 (1998).

[8] Clark, *Government Lawyers and Confidentiality Norms*, 83 Wash. U. L. Rev. 1033, 1049-1061 (2008). *See also* ABA Comment [3] following SCR 20:1.13.

[9] In a few narrowly defined circumstances, Wisconsin district attorneys may have a client other than the state – the county in enforcement of county ordinances, Wis. Stat. §978.05(2), an individual worker in enforcement of wage claims, Wis. Stat. § 109.09(1), and a crime victim for the enforcement of restitution rights at sentencing, Wis. Stat. § 973.20(13), (14). District attorneys may also be involved in representation of the "interests of the public" in certain matters involving juveniles. Wis. Stat. §§ 48.09(5), 938.09. This opinion focuses on prosecutors involved in the enforcement of criminal laws, their primary responsibility. The analysis of conflicts of interest involving the other roles noted would be informed by identifying the particular client involved.

[10] Shawano and Menominee Counties are combined into a single unit.

[11] Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L. J. 1528, 1558-1561 (2012).

United States are organized by county; only four states have one office for the entire state – Alaska, Delaware, Connecticut, and Rhode Island.[12]

This might suggest that district attorneys represent their respective counties rather than the entire state.[13] For several reasons, the Committee believes this view is mistaken and that in fact a District Attorney's client in criminal cases is the State of Wisconsin.

For one, criminal prosecutions involve enforcement of state-wide criminal statutes rather than local ordinances. The plaintiff, represented by the district attorney, is the State of Wisconsin. Regulation of district attorneys is controlled by state statutes – chapter 978 – rather than local provisions. Second, it is common for district attorneys and law enforcement agencies in different counties to work cooperatively and share information with each other and with various state-level agencies. It would not be accurate to view the various district attorney offices as wholly unconnected county-based entities.

This view is consistent with Wisconsin case law,[14] other judicial opinions,[15] ethics committees in other jurisdictions and the ABA Standing Committee on Professional Responsibility,[16] as well as academic writings.[17]

Previous Wisconsin ethics opinions have implied, without explicitly stating, that district attorneys involved in the enforcement of criminal laws act on behalf of individual counties rather than the

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[12] *Bureau of Justice Statistics 2007 Census of State Court Prosecutors* (December 2011, NCJ 234211). At the federal level, the system is separated into ninety-four districts, each with its own United States Attorney.

[13] Wis. Stat. §§978.05(2), (6)(a) make the district attorney responsible for a variety of non-criminal matters, some of which may not involve representation of the state but instead the county or some other entity. In such cases, the analysis of conflicts would be different.

[14] *In re Penn,* 201 Wis. 2d 405, 407, 548 N.W.2d 526 (1996); *State v. Russell*, 83 Wis. 330, 338, 53 N.W. 441 (1892); *Biemel v. State*, 71 Wis. 444, 450-451, 37 N.W. 244 (1888).

[15] For example, in *Berger v. United States*, 295 U.S. 78, 88 (1935), the Court said,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

[16] *See, e.g., Ohio Ethics Op.* 2014-2; *Penn. Ethics Op.* 2016-005; *Ky. Ethics Ops.* E-444, E-291; *Tenn. S. Ct. Bd. of Prof. Resp. Op.* 2002-F-146 (2003); *In re Toups*, 773 So. 2d 709 (La. 2000); *New Hampshire Ethics Advisory Opinion* No. 1996-97/6; *Indiana Ethics Opinion* No. 1 of 1996, and *A.B.A. Formal Opinion* 142 (1935).

[17] Flemming, *The Political Styles and Organizational Strategies of American Prosecutors: Examples from Nine Courthouse Communities*, 12 Law & Policy J. 25 (1990).

state as a whole.[18] In the opinion of the Committee, this is incorrect and these opinions are withdrawn.

The idea that a district attorney represents the state in the enforcement of criminal laws is likewise consistent with the common understanding that a part-time district attorney may not represent criminal defendants in neighboring jurisdictions. The concerns behind this prohibition were well-stated by the ABA in Ethics Opinion 30 (1931):

> It is a well-known fact that prosecutors are granted courtesies by the police departments, as well as the prosecuting authorities, of other cities and counties throughout the country. This practice is a great benefit to the administration of criminal justice. If prosecutors indulged in the practice of defending criminals in states [or counties] other than their own, this helpful cooperation might easily and quickly be withdrawn. Other evils, detrimental to the proper enforcement of criminal laws, are not difficult to conceive, were prosecutors also acting as defenders of those accused of crime. Subjectively, the effect of such a practice upon the prosecutor himself must, in our opinion, be harmful to the interest of the public, whose service is the prosecutor's first and foremost duty.

For the foregoing reasons, the Committee concludes that, for purposes of analysis of conflict issues under the Rules of Professional Conduct for Attorneys (the "Rules") a Wisconsin District Attorney represents the State of Wisconsin in criminal cases and not the county or any other political subdivision of the state.

2. Application of the Conflict Rules

Because the State of Wisconsin is the part-time assistant district attorney's present client, SCR 20:1.7(a)(1) prohibits the lawyer from representing a criminal defendant anywhere in the state because such representation would be "directly adverse" to another client – the state.

While the part-time assistant district attorney would be barred from representing criminal defendants against the state, that disqualification would not necessarily apply to the representation of private clients against the state in matters that are wholly unrelated to state

[18] *Wisconsin Ethics Opinions* E-81-5, E-83-18, E-79-8, M-6/70 C, M-2/69 C.

criminal prosecutions. Indeed, ethics opinions[19] and case law from other states[20] support using a narrow definition of a government attorney's client for conflict purposes. Here, the District Attorney's representation of the state is expressly limited by Wis. Stat. § 978.05. This statute authorizes district attorneys to provide specialized legal services to the state; because the scope of their representation is defined narrowly, district attorneys cannot be regarded as lawyers for the state in all matters. Thus, the scope of an assistant district attorney's conflict does not extend to every possible matter in which the state may have an interest.

Although it is clear that the scope of the conflict is limited, the extent of possible conflicts is not as clear. At a minimum, an assistant district attorney and his private law firm would be conflicted from representing a client in any matter that falls within the statutory authority of the district attorney, under Wis. Stat. § 978.05. As the traditional work of district attorneys is the prosecution of criminal cases, it is clear that a private law firm that employs a part-time assistant district attorney could not represent criminal clients being prosecuted by the state.

However, while Wis. Stat. § 978.05 is a good starting point for the conflict analysis, it is not the ending point. Instead, a conflicts analysis must also take into account the full range of ethical duties that a lawyer owes a client. Because a district attorney's office may be involved in relationships with a wide range of government officials and agencies that implicate these ethical obligations, a nuanced conflicts analysis is necessary before any undertaking representation that involves a government interest.

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[19] See, e.g., *Arkansas Ethics Op.* 96-1 (1997) (lawyer representing water commission may represent clients in proceedings against other branches of city government if lawyer concludes that commission is entity distinct from city, and that his responsibilities to commission would not limit representation of other clients); *California Ethics Op.* 2001-156 (if city charter does not give constituent parts of city government any authority to act independently of city, city attorney does not represent them as "separate clients" and is therefore free to advise both mayor and city council on same matter, even though they are taking opposing positions); *District of Columbia Ethics Op.* 268 (1996) (concluding that a lawyer representing private clients against one city agency may under certain circumstances perform services for another city agency); *In re Supreme Court Advisory Comm. on Prof'l Ethics Op.* No. 697; 911 A.2d 51, 22 *Law. Man. Prof. Conduct* 623 (N.J. 2006) (lawyers retained to represent municipal entity in particular matter are not automatically prohibited from representing private clients in other matters before boards or agencies of same municipality) (N.J. 2006); *New York City Ethics Op.* 99-06 (1999) (law firm not per se prohibited from representing clients adverse to state even though one of firm's lawyers is representing state pro bono in unrelated matters as special counsel to Manhattan district attorney's office; representations involve "entirely separate agencies of New York State"); *Oregon Formal Ethics Op.* 2005-122 (2005) (private practitioner who sometimes serves as special prosecutor representing state in misdemeanor cases may represent private parties in unrelated civil matters against city or county).

[20] See, e.g., *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 17 *Law. Man. Prof. Conduct* 151 (S.D.N.Y. 2001) (rejecting contention that law firm retained to represent state on public assistance matters thereby represented all of executive branch for conflict purposes); *Aerojet Props. Inc. v. State*, 530 N.Y.S.2d 624 (N.Y. App. Div. 1988) (refusing to disqualify law firm from continuing to represent claimant in court of claims action against state for unpaid rent even though insurance carrier for state's indemnitor eventually retained same firm to defend personal injury claim involving same state office; "Given the multitudinous nature of the State's activities, even the appearance of impropriety seems de minimis here").

This analysis is likely to be highly fact-specific, so it is not possible to provide clear answers regarding the scope of the conflict. At a minimum, however, this additional conflict analysis must take into account the nature of the assistant district attorney's work on behalf of the State, as well as the nature of that office's relationship with county government. Some district attorney's offices have a close relationship with county or local officials that could give rise to ethical duties or limitations that would restrict a private law firm's ability to represent a client in non-criminal matters that involve these officials. Likewise, the risk of conflicts is high where an assistant district attorney handles cases on behalf of a government agency that has both criminal and civil jurisdiction. For example, a part-time assistant district attorney may work with the Department of Natural Resources in matters where a civil land use dispute has developed into a criminal matter. In such cases, the assistant district attorney would likely face conflicts under SCRs 20:1.7 and/or 20:1.9 that would preclude him from undertaking civil or criminal representations that involve the DNR as an adverse party. In contrast, if a part-time assistant district attorney is hired for a limited purpose, such as prosecuting misdemeanor traffic offenses, they would likely not face any conflicts in representing clients before the DNR or other state agencies.

3. Is the Conflict Subject to Informed Consent?

Under SCR 20: 1.7(b), a lawyer may be able to represent a client despite a conflict if certain criteria can be satisfied:

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in a writing signed by the client.

However, it is not clear whether a district attorney has authority to give informed consent to a conflict under such circumstances. Although SCR 20:1.11(a)(2) contemplates the possibility of informed consent by the "appropriate government agency", the Committee is not aware of any statute, rule or decision that addresses this issue, either to explicitly grant such authority or to deny it.[21]

[21] Arguably the general supervisory authority granted district attorneys by Wis. Stat. §978.05(8)(a) could be interpreted as giving her the authority to consent to conflicted representations. It appears this issue received its first mention in *A.B.A. Formal Opinion* 16 (1929). With little discussion, the committee concluded, "[n]o question of consent can be involved as the public is concerned and it cannot consent." This opinion was cited approvingly in several other A.B.A. opinions in the 1930s – Informal Opinions 34, 71 and 77, and also mentioned as a statement of

Resolution of the question of authority of the district attorney to consent to continued representation involving a conflict of interest is beyond the scope of the committee's authority. If a district attorney believes such authority exists, informed consent must be obtained from the state and the affected criminal defendant. SCR 20:1.7(b). On the other hand, if the district attorney concludes authority to consent is lacking continued representation would be prohibited as the requisite consents could not be obtained.

Nonetheless, at least for directly adverse criminal defense work, it is difficult to imagine circumstances where it would be in the State's interest to provide the necessary consent even if permissible.

Likewise, it seems unlikely that a private client – particularly a criminal defendant – would be willing to have his lawyer provide the government with the disclosures necessary to obtain the State's informed consent under Rule 20:1.0(f). Therefore, in circumstances where a conflict has been identified, the Committee suggests that such a conflict be viewed as unwaivable.

4. Imputation of the Part-time District Attorney's Conflicts.

Questions remain as to what conflicts, if any, are imputed to the district attorney's office and to the private law firm in this situation and whether those conflicts necessarily result in disqualifications. Imputation of disqualifications for private, non-governmental law firms are governed by SCR 20:1.10. Under subsection (a) of that rule:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:
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> (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

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existing law in an early treatise, Drinker, *Legal Ethics* 120 (1953). More recently, several jurisdictions have rejected this flat rule and view their rules as allowing consent. *N.Y. State Ethics Op.* 629 (1992); *Md. Ethics Op.* 99-28 (1999); *Oregon Formal Ethics Op.* 2005-122 (2005); *Ill. Ethics Ops*. 95-5 (1995); 86-4 (1986*); Penn. Ethics Op.* 2006-24 (2006). Other states have retained the prohibition. *N.J. Ethics op.* 697; *Ohio S. Ct. Ethics Op.* 14-002 (2014). One commentator has noted,

> Such a flat rule threatens more harm than good unless it is limited to circumstances in which the potential for corruption is high because of the lawyer's relationship to the governmental body or to powerful political groups that might strongly influence decisions made in the body's behalf.

Charles Wolfram, *Modern Legal Ethics* § 7.24, at 348 (1986) (footnotes omitted). While it seems the weight of current law supports viewing elected prosecutors of having such authority it is beyond the purview of the committee to opine on the proper interpretation of the relevant statutes.

(2) the prohibition arises under SCR20:1.9, . . .

Here, the part-time district attorney's disqualification from representing criminal defendants arises under SCR 20:1.7(a)(1). In the lawyer's private law firm, SCR 20:1.10 generally prohibits other lawyers in that firm from representing clients the lawyer personally could not. If the lawyer would be prohibited from accepting a criminal defendant's case because of a conflict arising from the lawyer's work as a part-time district attorney, other lawyers in the firm would also be prohibited from undertaking that representation.

The exceptions arising under Rule 1.10(a)(1) and (2) do not apply in this situation. Subsection (a)(1) makes an exception for disqualification based on a personal interest of the prohibited lawyer but the disqualification in this situation is based on an adverse client, not the lawyer's personal interest. Subsection (a)(2) creates an exception for conflicts with former clients, but in situations where the firm is employing a lawyer who also serves as a part-time assistant district attorney, the conflict is with a current client. Therefore, subsection (a)(2) would not apply.

SCR 20:1.10(c) allows disqualification to be waived of the conflict by the affected client under the conditions stated in SCR 20:1.7. However, as discussed above, the conditions in SCR 20:1.7(b) are not available in this situation.

Thus, the private firm employing a part-time assistant district attorney would be disqualified from representing state court criminal defendants in Wisconsin, regardless of whether that representation arises in the same county in which the individual lawyer is employed as a part-time district attorney.

In the case of a conflict for the individual lawyer, a different set of considerations arises regarding imputation of that conflict to the District Attorney's Office in which the lawyer is employed part-time. Consider, for example, a lawyer who, on behalf of the private firm, represents an individual in a civil matter, and that individual is then prosecuted by the District Attorney's Office which employs the lawyer. Under SCR 20:1.7(a)(1) the lawyer cannot prosecute his civil client. The individual lawyer's conflict is not, however, imputed to the entire District Attorney's office. SCR 20:1.11(f) explains:

> The conflicts of a lawyer currently serving as an officer or employee of the government are not imputed to the other lawyers in the agency. However, where such a lawyer has a conflict that would lead to imputation in a non-government setting, the lawyer shall be timely screened from any participation in the matter to which the conflict applies.

Consequently, with screening, any conflict disqualifying the part-time assistant district attorney from a criminal prosecution would not require disqualification of the entire district attorney's office.

Wisconsin Formal Ethics Opinions E-79-8, E-83-19 and E-81-5 and Memo Opinions M-6/70 C and M-2/69 C are withdrawn.